1983

# The State of Utah v. Robert Hicken : Brief of Respondent in Opposition to Petition for Rehearing

Utah Supreme Court


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IN THE SUPREME COURT OF THE STATE OF UTAH

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| FIRST NATIONAL BANK OF LAYTON, | : | |
| Plaintiff/Respondent, | : | |
| vs. | : | Case No. 18324 |
| SCOTT L. EGBERT, MACK G. EGBERT and CORA EGBERT, | : | |
| Defendants/Appellants. | : | |

# BRIEF OF APPELLANTS

Appeal from a decision granting plaintiff's motion for summary judgment in the Second Judicial District Court, County of Davis, State of Utah, the Honorable J. Duffy Palmer presiding.

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## STATEMENT OF THE NATURE OF THE CASE

Appellants, Mack and Cora Egbert, appeal from a decision granting respondents' motion for summary judgment in the Second Judicial District Court, County of Davis, State of Utah, the Honorable J. Duffy Palmer presiding.

## DISPOSITION IN THE LOWER COURT

Respondents' motion for summary judgment was granted after oral argument before the Honorable J. Duffy Palmer, on December 24, 1981. The final amended judgment was entered against Mack and Cora Egbert on February 25, 1982.

## STATEMENT OF THE FACTS

This case involves a series of notes representing loans taken out by Scott Egbert from the First National Bank of Layton. The appellants, Mack and Cora Egbert, the parents of Scott Egbert, were co-signers on two of the loans.

The first of these notes was signed by Scott Egbert and Mack Egbert on September 30, 1975, was in favor of the respondent and was in the amount of $9,171.60. The loan included interest at the rate of 12.5% and carried as security, the pledge of a 1976 Ford

pickup truck belonging to Scott Egbert.

The second note was signed by Scott Egbert and Cora Egbert on September 17, 1976, again in favor of respondent, in the amount of $1,167.36. This note included interest at the rate of 13.8% until the time of maturity, which was September 20, 1978, and a 10% interest rate thereafter. Scott Egbert's 1976 Ford pickup truck was also assigned as collateral on this loan.

A third note was signed by Scott Egbert on June 16, 1977, in favor of the respondent in the amount of $350. This note carried an interest rate of 12%.

On August 24, 1978, Scott Egbert executed a fourth promissory note in favor of the respondent in the amount of $13,957.92. This fourth note included an interest rate of 13.12%. This fourth note was a consolidation and refinancing of the prior three notes. It combined the amounts owed on the prior notes, which had not been paid in a timely manner, and included certain penalties and accrued interest from the prior notes. The fourth note also included unpaid charges for automobile insurance incurred on the truck posted as collateral on the prior notes and a charge for credit life insurance. The fourth promissory note was originally set up for the signatures of Scott Egbert and his wife, Pamela Egbert. However, Pamela Egbert did not sign the note. The note provided for equal monthly installment payments of $193.86, which would have paid off the loan in a period of six years.

The loan disclosure statement attached to loan number four, was signed by Scott Egbert and indicated that the proceeds of the loan would be utilized to pay off the principal and interest of

the three prior loans, to pay the automobile insurance, provide credit life for the borrower and pay the various incidental fees and charges relating to making the loan. In addition, the loan disclosure statement indicated that the 1976 Ford pickup truck would be posted as collateral, and that the borrower would assign a certain real estate contract as security for the loan. A quit-claim deed and an assignment of escrow covering the pledged real estate were signed by Scott Egbert, but were not signed by Pamela Egbert, who was a joint owner of the property. The respondent did not record the quit-claim deed, nor did it file the assignment of escrow with the escrow holder.

The appellants, Mack and Cora Egbert, did not sign the fourth promissory note and were informed by Scott Egbert that the prior loans had been paid by the fourth promissory note and, therefore, appellants took no further action to insure payments on any of the loans.

Limited payments were made on the first, second and third notes and no payments were made on the fourth note. At the time of the signing of the fourth note, the respondent stamped "cancelled by renewal" on the face of the first three notes. After Scott Egbert signed the note in August, 1978, the respondent made normal collection efforts related to the fourth note, which included repeated billings and letters to the signer, Scott Egbert, but made no attempts to collect from Mack and Cora Egbert. On February 22, 1980, the respondent, through its attorney, instigated legal action against Mack Egbert, Cora Egbert and Scott Egbert, to enforce all four of the promissory notes, and pursuant to that action,

requested a writ of replevin to obtain possession of the motor vehicle. Scott Egbert voluntarily surrendered the vehicle to the respondent.

In September, 1981, the respondent amended its complaint to exclude the fourth cause of action relating to the fourth promissory note and proceeded with collection procedures on the first, second and third promissory notes. After the denial of a motion for summary judgment made by the appellants, the respondent filed a motion for summary judgment on December 14, 1981, alleging that the fourth promissory note lacked consideration and, therefore, was invalid. Respondent further requested that judgment be granted against the appellants based upon the first and second promissory notes if the fourth note was determined by the court to be invalid. After hearing arguments of counsel on December 24, 1981, the Honorable J. Duffy Palmer granted respondent's motion for summary judgment. The final amended judgment was signed by the court on February 25, 1982, and was assessable only against Mack and Cora Egbert since Scott Egbert had filed a petition in bankruptcy.

## ARGUMENT

### POINT I

### THAT ADEQUATE CONSIDERATION EXISTS FOR THE FOURTH PROMISSORY NOTE AND THAT THE NOTE IS A VALID ENFORCEABLE OBLIGATION.

As a general principle of law, there must be adequate consideration to support a note, whether it is a note extending a prior obligation, a note consolidating several prior obligations or an entirely new note. In order to constitute valid consideration for an extension of time for payment of a note or for an extension

of time to pay a consolidation of several notes, there must be either a benefit to the creditor or a detriment to the debtor. 10 CJS, Bills & Notes, Sec. 160, Page 633; "The adequacy of the consideration is left to the discretion of the parties. However slight the benefit to the creditor or detriment to the debtor, provided it is susceptible of legal estimation, it is sufficient." 85 ALR 328.

In viewing the consideration necessary to support an extension of an existing note or an extension of several existing notes, it is necessary to look for a slightly different type of consideration since often additional money is not advanced as part of the extension or a consolidation arrangement. The advantages reaped by the lender in an extension situation normally include benefits to be realized in the future, such as increases in the interest rate, interest collectible over a longer period of time, additional security, inclusion of disputed items in the agreed upon loan amount and the convenience of collecting and administering one note rather than several notes. The detriment to the borrower in refinancing, consolidation or extension arrangements generally includes paying an increased rate of interest, paying interest on interest owed from a prior loan and paying interest for an extended period of time. 10 CJS, Bills & Notes, Sec. 160, Page 633, and 85 ALR 327.

In the present case, consideration for the fourth summary or consolidation note took the following forms:

1. The new note itself is a form of consideration. At the time the note was signed, Scott Egbert was behind in his payments on the prior three notes. The new note brought the bank records

current, got a new commitment from Scott Egbert to make the payment as required and consolidated the various payments on all of the notes into one note, for which one monthly payment was required. The convenience of administrating one loan rather than three loans is certainly a benefit to the lender. Outlining new terms and arranging a new method of payment has generally been accepted as a form of consideration for an extension or renewal note. 10 CJS, Bills & Notes, Sec. 160, Page 633.

2. The loan disclosure statement attached to the loan in question, indicates that included in the principal amount of the note are certain charges incurred for automobile insurance for Scott Egbert in prior years. There is no evidence that these amounts had been agreed upon or accepted by Scott Egbert, and their inclusion in the fourth note constitutes a compromise and a firm agreement by Scott Egbert to pay the amounts and interest on the amounts over a period of six years. It is generally held that an agreement to pay disputed items or contested claims acts as good consideration for an extension or renewal agreement. 85 ALR 327, 10 CJS, Bills & Notes, Sec. 160, Page 633.

3. The loan disclosure statement attached to the fourth promissory note further indicates that additional funds in the amount of $544, were advanced to cover credit life insurance for Scott Egbert. This amount is additional consideration advanced to Mr. Egbert, upon which he agreed to pay interest over the period of the loan. The credit life insurance was a benefit to Scott Egbert and would have also been a benefit to the respondent in the event of Scott's death, since the loan would then have been paid

by the insurance company. In addition, the bank was to receive interest on the amount advanced for credit life insurance over the period of the loan.

4. Changes or alterations in the interest assessable have universally been held to be valid consideration for an extension agreement. In the present case, the modifications of interest took several forms.

a. As set out in the Utah case of State Bank of Lehi v. Woolsey, 565 P2d 413 (Utah 1977), this court has ruled that the mere agreement to pay interest at the same rate as was previously charged for an extended period of time constitutes valid consideration for an extension or renewal agreement. In making this determination the court cited Williston on Contracts, 3rd Edition, Sec. 122, Pages 512 through 514, as follows:

> "When a debtor and creditor agree that an interest bearing note shall be extended for a fixed time, the promise of each is of something detrimental, as the creditor promises to forbear the collection of his claim and the debtor gives up his power to stop the accrual of further interest by the payment of the principal at maturity. Accoringly, such agreements are generally upheld." Id at 416, 417.

The court in State Bank of Lehi also cites as authority for this proposition, the Arizona case of Hackin v. First National Bank of Arizona, 419 P2d 529 (Arizona 1966.) This case involved a situation where a bank agreed to extend a note for a period of ninety days on the same terms as the original note. A short time after the beginning of the renewal period, the bank instigated action to collect on the original note. In rendering its decision

against the bank, the court indicated:

> "It is generally held that a debtor's promise to pay interest during the entire period of extension, thereby relinquishing his right to pay less interest by sooner discharging the principal debt, is sufficient consideration for the creditor's promise to extend the time for payment of the note."
> Id at 530.

The rule set out by these cases is one based on good logic. It would be an unworkable system if the court were to rule that all agreements renewing notes are invalid if the interest and terms remain basically the same. The consideration for such an arrangement or extension is the lender's desire to earn interest for an additional period of time and the borrower's right not to have to pay back the money for an extended period.

In the present situation, the various notes and related charges and obligations were consolidated into one note. Scott Egbert agreed in that note to make payments over an extended period of six years, and further agreed to pay interest on the outstanding balance at a rate of 13.12%. The respondent certainly derives an advantage by entering into an agreement whereby it will collect interest on an amount owed to it for an additional six years.

b. At the time of the signing of the fourth promissory note, certain unpaid interest had accrued on the three prior promissory notes. These amounts of unpaid interest were accumulated and added into the principal of the fourth promissory note and interest was imputed into the fourth note on not only the principal of the original three notes, but also on the accumulated interest

on the original three notes. Therefore, the bank received the benefit of being promised in the fourth note, not only interest on the principal on the original three notes, but also interest on the interest assessed but not collected on the original three notes. Paying interest on interest in this manner has also been held to constitute valid consideration for an extension, renewal or consolidation agreement. 85 ALR 327, 329, 10 CJS, Sec. 160, Page 633.

c. The fourth promissory note increased the interest rate to 13.12%. This is a substantial increase in the rate of interest payable over the interest rates assessed in the prior three notes. The first note had carried an interest rate of 12.5%. The second note carried an interest rate of 13.8% until maturity, which was within a month of the signing of the fourth promissory note. After maturity, the second promissory note carried an interest rate of 10%. The third promissory note carried an interest rate of 12%. Therefore, the overall interest rate was increased between one-half and one percent over the interest collectible on the prior three notes. It is uniformally held that increases in the interest rate will act as valid consideration for an extension, renewal or consolidation of debt agreement. 85 ALR 327, 329, 10 CJS, Bills & Notes, Sec. 160, Page 633.

5. The fourth note was secured by the same 1976 Ford pickup truck that secured the first three notes, and was also to be secured by an assignment of a real estate contract. Scott Egbert signed an assignment of escrow agreement and a quit-claim deed to certain property owned by he and his wife, Pamela Egbert. The bank did not record the quit-claim deed or provide the escrow holder with

a copy of the assignment of escrow. Had this action been taken, even though Pamela Egbert's signature did not appear on the assignment, any equity in the real estate contract belonging to Scott Egbert could have been obtained as security and eventually as payment on the fourth promissory note. The signing of the various documents as requested by the bank certainly gave to the bank the potential for additional security. The fact that the bank did not follow through properly to protect their collateral and to secure for themselves, the benefits of the sale of that collateral, does not alter the fact that consideration was given to the bank at the time the documents were signed by Scott Egbert.

It is uniformally held that granting new collateral to secure a loan is valid consideration for an extension, renewal or consolidation of debt agreement. 85 ALR 327, 330, 10 CJS, Bills & Notes, Sec. 160, Page 633.

As in any extension agreement, the consideration granted to the lender is not the same as the consideration granted on the initial note. However, as in the case of most extension agreements, in the present case there were substantial benefits reaped by the lender in exchange for extending the pay-back of the loan over a longer period of time. Of course, the respondent's consideration was primarily consideration to be received in the future as the note was collected. However, whether collected presently or promised in the future, the consideration is still valid and acceptable.

## POINT II

## WHETHER THE CONSIDERATION GIVEN FOR THE

SIGNING OF THE FOURTH PROMISSORY NOTE WAS AGREED UPON AND ACCEPTABLE TO BOTH PARTIES.

There was certainly consideration in a number of forms granted to the bank at the time of the signing of the fourth promissory note. However, in presenting its argument for the summary judgment motion, the respondent agreed that any consideration must be in the form agreed upon and accepted by both parties. Assuming for the sake of argument that this is the law, a determination as to whether the consideration given at the execution of the fourth promissory note, was the consideration contemplated by the various parties, is a factual matter that must be determined by a trier of fact.

Even though a factual dispute exists, there are a number of events clearly indicating that the parties intended the fourth promissory note to be effective, and that any consideration granted pursuant to that note was accepted by both parties.

1. At the time the fourth note was signed, the first three notes were marked by the bank "cancelled by renewal." This certainly indicates that the bank no longer intended to look to the first three notes for collection, but instead, would enforce and collect the fourth promissory note since it fully encompassed all financial obligations between the parties after its execution date. If the fourth promissory note was not valid, as argued by the respondent, and if the consideration had not been accepted by the bank, it seems very strange that the first three notes would have been cancelled.

2. After the signing of the fourth promissory note, the

normal payment documents were forwarded to Scott Egbert so that he could begin payments on the loan. When payments were not forthcoming, the bank instigated normal collection proceedings against Scott in an attempt to collect the fourth promissory note. Late charges were assessed on the fourth note when payments were not received, and those late charges were later written off as indicated on the face of the note. These are very curious procedures for a bank to take in order to collect an invalid note.

3. No attempt was made to collect from Mack and Cora Egbert on the first and second promissory notes, thus indicating that the bank was looking to the fourth note as their means of collecting the obligation.

4. When this suit was filed in February of 1980, a year and one-half after the signing of the fourth note, the bank still considered the fourth note valid and, therefore, filed action for default on the fourth note. A writ of replevin to obtain possession of the truck was sought by the bank based on all four of the promissory notes. No issue was raised in any of the original pleadings indicating that the bank did not consider the fourth promissory note effective. In fact, up to that point, diligent efforts had been made to collect on the fourth promissory note, including the instigation of legal action to collect the note.

It was not until the respondent realized that there existed a potential argument as to the validity of the note, that it backtracked on its position and suddenly made the claim that the fourth promissory note should not be upheld because it was invalid from the beginning. This is a very strange argument in light of

the fact that from August of 1978, when the fourth note was signed, until the time the amended complaint was filed in September, 1981, a period of over three years, the bank made every possible effort to collect from Scott Egbert on the fourth promissory note.

Whether the consideration granted and discussed above for the fourth promissory note was the type of consideration contemplated by the parties and whether that consideration was acceptable to the parties are questions that must be determined by a finder of fact after carefully analyzing the attitudes and intentions taken by both the signer, Scott Egbert and the respondent.

## POINT III

### SUMMARY JUDGMENTS ARE GRANTED WITH GREAT RELUCTANCE AND ONLY WHEN THERE ARE NO DISPUTED FACTS AND THE UNDISPUTED FACTS ARE CLEARLY IN FAVOR OF THE MOVING PARTY.

The general rule in the State of Utah is that summary judgments are not looked upon with a great deal of favor. Brandt v. Springville Banking Co., 353 P2d 460 (Utah 1960.) In order to grant a summary judgment, it is necessary for a court to determine that there are no disputed facts and that the facts that do exist leave no issue that properly should be decided by a finder of fact. If there are facts in question that have not been determined through discovery and are yet to be presented at trial, then the judge's obligation is to allow the case to go to trial so that all of the facts can be submitted at the trial. Reliable Furniture Co. v. Fidelity & Guaranty Ins. Underwriters, 398 P2d 685 (Utah 1965), Rich v. McGovern,

551 P2d 1226 (Utah 1976.) Judge Palmer granted the respondent's motion for summary judgment based on the fact that he found no consideration for the fourth promissory note. As a result of that ruling, the court found the first, second and third promissory notes to be valid and granted judgment against the appellants, Mack and Cora Egbert, based on the first and second promissory notes. The issues before the court, in this case, are whether there was consideration for the fourth promissory note, as discussed in Point I, and whether that consideration was as contemplated by the parties, as discussed in Point II. Before a final determination can be made in these areas, a number of disputed facts and unanswered questions must be determined by a trier of fact. Among these are:

1. The reason for Pamela Egbert not signing the fourth promissory note and not signing the quit-claim deed and assignment of escrow.

2. Whether Pamela's not signing the various documents impaired, in any way, the security granted to the respondent or whether it would have recovered whatever equity did exist in the contract by filing the document signed by Scott Egbert alone.

3. What discussions and representations took place between Scott Egbert and the respondent regarding the validity of the fourth promissory note.

4. What collection efforts were taken by the respondent to collect the fourth promissory note.

5. Whether the fourth promissory note was considered by the bank, up until the time that an amended complaint was filed, as a valid and enforceable obligation.

Without the answers to these questions, it would be difficult to determine whether the consideration given to the bank was sufficient and as contemplated, when the fourth promissory note was signed.

## CONCLUSION

This case comes before the court from an order issued by the Honorable J. Duffy Palmer, granting respondent's motion for summary judgment. The judge granted the summary judgment motion based on the fact that he found no consideration for a note signed on August 24, 1978, between Scott Egbert as borrower, and the First National Bank of Layton as lender, and, therefore, declared the note invalid. When this note was declared invalid, the respondent was further granted summary judgment on two prior notes, upon which the appellants are cosigners, and judgment was granted against appellants.

Judge Palmer erred in finding that no consideration was given for the disputed promissory note. As is often the case in extension or consolidation arrangements, the consideration is somewhat different from the normal consideration granted when an original note is signed between a borrower and lender. However, the consideration is no less valid, even though it takes a different form than the consideration for an original note. It is clear that there was consideration granted for the extension or consolidation note, and that the consideration was in a form generally accepted as adequate to support an extension or consolidation agreement.

The remaining question presented by this appeal is the

acceptance by the respondent of the consideration given. Pursuant to the guidelines set by this court for the granting of summary judgment motions, this question should be presented to a finder of fact for a determination as to whether the consideration was accepted by the parties, and for a determination as to the validity of the fourth promissory note.

Appellants request that this case be remanded to the Second Judicial District Court for Davis County, State of Utah, for trial on the merits.

Respectfully submitted this 14th day of May, 1982.

REED M. RICHARDS
Attorney for Appellants